

State of Colorado



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Governor

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Director

DPA

Department of Personnel
& Administration

State Personnel Board
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Meeting Minutes September 21, 2004

The State Personnel Board met in public session on Tuesday, September 21, 2004, at Fort Lewis College, Memorial Student Lounge, Durango, Colorado 81301. There were also persons in attendance at the meeting via teleconferencing at the Board offices at 1120 Lincoln Street, Suite 1420, Denver, Colorado 80203.

The meeting was called to order by Chair John Zakhem at approximately 9:05 a.m. In addition to Mr. Zakhem, Board members Elizabeth Salkind, Diedra Garcia, and Troy Eid were present. Board member Linda Siderius joined the teleconference from her Denver office at approximately 9:30 a.m.

Richard Djokic, Board Director, and First Assistant Attorney General James Carr, Board Counsel, were present in person in Durango. Jane Sprague, General Professional III, was present via teleconferencing in Denver.

I. REQUESTS FOR RESIDENCY WAIVERS

A. September 1, 2004 Report on Residency Waivers

Mr. Djokic reported that he granted three residency waiver requests in the last month: a General Professional V - Benefits Supervisor for the Department of Personnel and Administration (case number 2005R001); a General Professional VII - Nursing Home Administrator for the Department of Human Services (case number 2005R002); and Correctional Officer (Intern) for the Department of Corrections (case number 2004R008). Per Ms. Garcia's request, he also explained the requirements for such requests.

II. PENDING MATTERS

There were no pending matters before the State Personnel Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

There were no Initial Decisions or other final Orders of the Administrative Law Judges or the Director on appeal to the State Personnel Board this month.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Barbara Mickens v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2003G076(C).

Director Djokic recused himself from participation in the discussion of this case. Ms. Sprague called the case number and the vote in lieu of the Director.

Ms. Salkind moved to adopt the Preliminary Recommendation of the Director and grant the petition for hearing. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Ms. Salkind, and Mr. Zakhem. Ms. Siderius was absent for this part of the meeting.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. Brent Tarver v. Department of Corrections, State Personnel Board case number 2004B138.

Complainant, a Correctional Officer I (CO I), appealed Respondent's termination for violation of administrative regulations. Complainant failed to comply with standards of efficient service or competence, willful misconduct, including either a violation or the State Personnel Board's rules or of the rules of the agency of employment, willful failure or ability to perform duties assigned and final conviction of a felony or any other offence involving moral turpitude. Complainant had engaged in giving inmates access to his personal post office box as a means of sending illegal drugs to later be brought into the facility, agreeing to engage in illegal conduct with inmates, and failing to report the inmates' repeated attempts to have Complainant bring drugs into the prison.

In late January 2004, a Buena Vista Correctional Complex (BVCC) inmate and confidential informant of the prison authorities notified BVCC staff that a correctional officer had agreed to bring methamphetamine into the complex in return for his receipt of one-third of the drugs. The inmate informed staff that the drugs were going to be delivered to the staff

member's post office box. The inmate had provided accurate information about illegal activity in the prison on several previous occasions, and the confidential informant was reliable and credible. A few days after the initial tip, the informant revealed to the DOC Inspector General the number of the post office box in Buena Vista that would contain illegal drugs. Respondent's Inspector General representative met with the District Attorney's office to organize and plan surveillance of the package at the Post Office. On February 19, 2004 Complainant's wife arrived to pick up the package and was advised of the reason she was stopped and agreed to go to the police station for questioning.

On February 19, 2004, Complainant was arrested while at work and taken into police custody. Complainant denied his knowledge of the package. Complainant argues that he was approached by two inmates to bring drugs into the facility and stated he told them no. The inmates asked him for his address and Complainant states he did not give it to them but laid down a magazine that had a subscription address label with his post office address on the cover. Complainant denies any prior knowledge that a package would be delivered to his post office box and further denied any intent to bring drugs into the facility.

The ALJ found that Complainant committed the acts upon which discipline was based and concluded that Respondent's action was not arbitrary, capricious or contrary to rule or law. Respondent could no longer trust Complainant to enforce the prison rules and regulations and posed a danger to the prison community and the public. The ALJ affirmed Respondent's disciplinary termination and dismissed Complainant's appeal with prejudice.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is September 22, 2004.]

B. Bruce Rensel v. Department of Human Services, Office of Information Technology Services, State Personnel Board case number 2004B073.

Complainant, an Information Technology Professional III (IT III), appealed his termination of employment for failure to comply with the performance objectives and expectations noted in an August 14, 2003 memorandum, and not providing sufficient justification as to why he did not comply.

On January 2000 Complainant was given a corrective action for poor performance in the areas of professional/technical competence, communications, and organizational commitment by Barbara Gilmore (Complainant's direct supervisor at the time of his termination) after three or four months of her hire. Complainant complied with the corrective action but did not grieve the corrective action. Larry Collins, IT III for DHS

nursing including the Homelake Nursing Home, learned that ARCServe was not backing up the Homelake server on May 21, 2003, and called Gilmore to advise her of the ARCServe backup problem on the Homelake servers and asked if she wanted him to fix it or if he should call Complainant. Gilmore advised Collins to contact Complainant regarding the backup problem. On May 21, 2003, Collins emailed Complainant asking if Collins should reload ARCServe and Gilmore was cc'ed on the email. Complainant spent four hours on the Homelake ARCServe problem, checking configuration files and replied to Collins, directing him to restart the Homelake server. The following day Complainant and Collins discovered there were still problems with the server at Homelake. Complainant then learned that the problem was not at Homelake but that the server itself was having problems. On May 28, 2003, the Homelake server was finally rebooted and the problem resolved.

On June 2, 2003, Gilmore issued a corrective action for Complainant's "lack of professional, technical and communicative competence" in connection with the May 2003 Homelake server backup problem. The corrective action states Complainant "did not provide any communication" to Gilmore via voicemail, email, in person and/or the weekly status updated regarding the Homelake problem; he did not enter a Priority 1 Help Desk ticket; and he did not communicate with the Homelake Director or Administrator regarding the backup problem. Complainant did not agree with the corrective action of June 2003 because he thought he had informed his manager and had handled the problem; however, Complainant did not grieve the corrective action due to his concern of retaliation against him.

On August 4, 2003, Steve Swanson, DHS Chief Technology Officer, sent Complainant a letter notifying him of a Board Rule R-6-10 meeting to discuss non-compliance of the June 2, 2003 corrective action. The R-6-10 meeting was held on August 12, 2003, and on August 13, 2003, Swanson imposed a disciplinary action against Complainant by reducing Complainant's salary by \$500.00 for the month of September.

The ALJ found that Complainant did not commit the acts for which he was disciplined. Complainant was terminated for failure to perform competently under the objectives and expectations of Gilmore's August 14th memo. While failure to perform competently is an allowable basis for discipline, under Board Rule R-6-5 an employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. There was no evidence as to Complainant's performance from August 14, 2003, through September 26, 2003. Respondent did not present any notes or documentary evidence that Complainant did not perform the objectives and expectations outlined in Gilmore's August 14th memo. Respondent did not present any type of

evaluations of Complainant's performance, and Gilmore, in Respondent's rebuttal case, did not recall any specific performance issues from August 14th through September 26, 2003. Respondent did not meet its burden of establishing that Complainant failed to meet the objectives and expectations of the August 14, 2003 memo.

The ALJ found that actions predetermining the outcome of a pre-disciplinary meeting or that make an employee's attempts to present mitigating information during such a meeting futile violate both the spirit and letter of the R-6-10 process. An email dated September 15th from Eich to Gilmore instructs Gilmore to terminate Complainant's computer and building access while he was in the meeting with Swanson, an instruction that presumes the outcome of the R-6-10 meeting. Eichs' instructions to Swanson render the September 26, 2003 meeting a meaningless exercise with a foregone conclusion. The ALJ found that the discipline imposed was not within the range of reasonable alternatives.

On August 26, 2004, the ALJ ordered Respondent's action be rescinded and Complainant be reinstated to his former position or a comparable position with full back pay and benefits and attorney fees and costs awarded to Complainant.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is September 27, 2004.]

VI. REVIEW OF THE MINUTES FROM THE AUGUST 17, 2004 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Ms. Garcia moved to approve the minutes of the August 17, 2004 meeting as submitted. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, and Mr. Zakhem. Ms. Salkind abstained because she was not present at that meeting. Ms. Siderius was absent for this part of the meeting.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS AUGUST 17, 2004 PUBLIC MEETING:

- A. Albert McNeill v. Department of Labor and Employment, State Personnel Board case number 2004G006.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny petition for hearing.

- B. Richard Quintana v. Department of Corrections, State Personnel Board case number 2004G067.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR - Paul Farley, Deputy Executive Director

Mr. Farley presented his report as an update on current Department of Personnel and Administration (DPA) topics followed by questions from the Board members and the audience.

1) Redesign of the benefits package - DPA is re-evaluating responses and the spectrum of coverages, with the health insurance plan emerging as an "HMO look-alike." There are more options for employees, including health savings accounts, which could be rolled forward every year. In addition, self-funding is being considered so that the state would administer its own programs and offer a broader array of plans. The fiscal year will become the cycle for benefits as of July 1, 2005, and employees will have open enrollment in both the fall of 2004 and the spring of 2005. To accommodate the conversion of the health plan from the calendar year to the fiscal year, the current fall plan being presented is a 6-month plan, with deductibles to be apportioned accordingly (January 1, 2005-June 30, 2005).

2) Policy changes - In line with legislation adopted at the last session, a permanent rule for House Bill 04-1446, the so-called "moonlighting bill," which allows employees to split time between agencies, became effective September 1, 2004. With regard to House Bill 04-1009, the Higher Education opt out bill, Colorado State University (CSU) has already taken steps to opt out of the state's risk management program and others may follow.

Procedures for implementing employment lists and referrals are being considered for adoption as a result of rulemaking on September 2, 2004. The effect of the procedures would be to allow the referral of three names for each vacancy in a class, instead of the current practice of referring three names for the first vacancy and one name for each additional vacancy. As an example, with three vacancies in a class, nine names (a list of nine) would be referred for three vacancies, instead of five names (three plus two). When questioned about the response of employee organizations to these changes, Mr. Farley stated that there was not a lot of interest either way.

3) Total compensation - The 5-year plan is to move toward flexible and competitive salaries and benefits, which are currently lagging behind the market. The salary and pay for performance funding was \$56 million short this last year, and benefits fell \$31 million short, but "we're chipping away at it," and eventually state employees will see more increase in their paychecks than in recent years. That is, they will net more money in their paychecks from better funding for pay for performance and benefits.

4) The old incentive statute has been repealed, and new legislation requires DPA to submit a program to the legislature by December 1, 2004. An email link for people who wish to contact DPA is dpacomment@state.co.us.

5) The Annual Human Resources Conference at the Arvada Center is scheduled for October 22, 2004.

In response to questions from Ms. Salkind about the percentage of employees not enrolled on the state's health insurance plan and a health insurance plan with a low deductible to target those without health insurance, Mr. Farley stated that approximately one-third of state employees were not enrolled on the state's health insurance plan, but some of those are covered by spouses not working for the state. In addition, a health insurance plan with less coverage and a high deductible may be in the works for those currently without health insurance.

Responding to a question about moonlighting from Ms. Salkind, Mr. Farley stated that if an employee is working a regular state job and a second job for a different agency, both appointing authorities need to approve of the arrangement.

Ms. Garcia asked if there was a lot of interest in the health savings account concept, and Mr. Farley replied that there was a lot of interest because the employee manages the account himself so the rate of increase in cost is less.

Mr. Eid asked what impetus would lead an institution of Higher Education to opt out of the risk pool and if the trend toward opting out would continue. Mr. Farley stated that the roots in opting out were at the University of Colorado, which has had its own risk management program for a while. CSU feels it can do its own program to fit its needs and realizes that to opt out, all three areas of risk management are affected: property, liability, and workers' compensation, as the institution cannot opt out of only one area. The bill became effective July 1, 2004, and during the tenure of the emergency bill, CSU opted out. The rationale was that CSU was overpaying on liability but underpaying workers' compensation. When Ms. Salkind asked if CSU could "opt back in," Mr. Farley replied that the rules are silent on a timeline, except that a 12-month notice of intent to either opt out of or opt into the state risk management program must be given by the institution.

Steve Miller, of Fort Lewis College's Human Resources Office, asked several questions about topics in Mr. Farley's presentation. With regard to narrowing the pay ranges, Mr. Farley said the intent is to "boost up the bottom end of each range" since any good salary system allows a person to work his way through the range. Performance pay is now the vehicle by which a person can work his way through the range, whereas formerly the grade/step system was the vehicle. When asked if those at the bottom of the range would get 2.3% in salary survey regardless of performance, Mr. Farley stated it would take additional money for

people at the bottom to get 2.3% regardless of performance. However, if the bottom of the range is moved, everyone moves. The question was posed if state employees would receive another across-the-board salary increase, Mr. Farley stated that the occupational groups usually cause some variation. Finally, when questioned about a high deductible plan, Mr. Farley said that DPA was working to find different strategies, to manage the increase in health insurance costs, and to bid for the whole fiscal year next time.

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

Ms. Salkind raised the issue of the Fair Campaign Practices Act as it pertains to the Board, as stated in her September 17, 2004 letter to the Director, with Mr. Zakhem noting that two meetings ago, the Board voted to endorse Referendum A, Civil Service Reform. Ms. Siderius corrected him that it was at the last meeting in August 2004 that the Board so voted. Mr. Zakhem noted that, in addition to Ms. Salkind's letter, the Board was in receipt of the August 23, 2004 Memorandum regarding "Board Position on Civil Service Reform Measure" to the Director from Jo Romero, President, Colorado Federation of Public Employees (CFPE). Ms. Salkind stated that her question was in regard to actions (other than the vote to endorse), which comply with the statute, C.R.S. §1-45-117, asking Board Counsel to opine on the topic of which actions do not violate the Act.

Mr. Carr stated that it was within the Board's authority to endorse the referendum. With regard to political activities, there is no prohibition on personal actions where the expenditure of personal funds is appropriate. However, there are limitations relative to the expenditure of public funds for these purposes; in particular, there is a \$50 limit on expenditure of public funds. Regarding advocacy of a referendum, the expenditure limit is \$50; however, to publicize an action in endorsing the referendum, publication would need to be done in the same fashion as other publicizing by the Board. For example, posting it on the website, like the posting of the Minutes of the Board meeting, is a posting done in accordance with normal actions. Beyond that it goes to limitations. See *Colorado Common Cause v. Coffman*, 85 P.3d 551 (Colo. App. 2003).

Ms. Salkind asked how the limitation applied in a situation for the Board, such as travel to Durango for the Board meeting. Mr. Carr replied that he was not sure, but to the extent that state funds are being utilized, travel to Durango for the Board meeting was an appropriate expenditure of state

funds and was not an action supporting the referendum. If while he is in the area, such as Durango, a member uses his time to support the referendum, he can still expect to be reimbursed for travel to and from the Board meeting. A court may find that such an expenditure is not a proper expenditure of state funds. If one uses time to support the referendum and it includes travel to a Board meeting, how one uses his own time before returning from the Board meeting is his own. In the final analysis, Mr. Carr agreed with Ms. Salkind that it is a gray area.

Ms. Salkind remarked that Board members should stay far away from a gray area, such as this. She referred to the perception that it was not proper and the fact that such political activities may interfere with duties of the Board. Mr. Zakhem replied that it was not unclear to him where his duties to the Board lie, and it was also clear to him where his First Amendment duties lie. Ms. Garcia stated that if reimbursement is the issue, then the Board members would not ask for reimbursement. Mr. Eid then stated that he would not seek or accept reimbursement for his trip to Durango. Ms. Salkind also spoke to the possible taint to the Board, a body which formulates policy and makes decisions on cases. Mr. Eid expressed his disagreement with Ms. Salkind's assessment, stating that during the legislative session, both Mr. Eid and Ms. Salkind were speaking their minds. Mr. Eid also stated that there is nothing prohibiting members of the Board from expending personal funds to endorse a referendum. Mr. Zakhem also stated that he would not seek reimbursement for the Durango trip and that the Board members had not spent \$50 advocating for Referendum A.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

Steve Schwartz, Vice President of Finance, Fort Lewis College, thanked the Board for its attention to the concerns of Higher Education, including the rule change on referral lists, clarifying reasons for removal of persons from employment lists, and criteria for exemptions from the state risk management program. He declared that any changes to rules must reflect the principles of merit and fairness, that the funding structure of Higher Education is different than other funding structures, and that he is hopeful that Referendum A will pass. He wanted to know if Referendum A did not pass, would the exemption of Higher Education be brought up again?

Mr. Schwartz also addressed what he called the balancing responsibility to taxpayers, TABOR v. Amendment 23, and the conflict between the two, stating there is a "structural disconnect" between the financial structure of institutions of Higher Education and the classified personnel system, for example, tuition increases and personnel costs. The salary survey is

applied to a different environment and a large portion of the budget is mandated outside of TABOR. There are different systems in place between faculty and exempt and classified staff, so it is difficult to reconcile the budget when classified staff must get increases. Such increases to classified staff are an unfunded mandate for which it is difficult to find a solution in a lump sum budget. Mr. Eid said that the issue of Higher Education employees opting out of the personnel system was discussed in terms of all institutions or by individual institution and that there is a formal opinion of the Attorney General on the subject.

Mr. Zakhem then thanked Fort Lewis for its hospitality, with Mr. Eid asking if travel to outlying areas, such as Durango, was good for the Board. The possibility of teleconferencing in the future was mentioned, and Ms. Garcia stated that it was beneficial for the Board to do outreach to the community. She has talked to employees who have said that when Board members travel around the state, the Board "must really care" and that employees appreciate the time and trouble that Board members take to come out. She also stated that if people understand that Board members will come regularly, they will attend the meetings. Ms. Salkind stated that it should be a more broad-based, general program. One kind of training most members seemed to agree on that was needed was supervisory and management training. Mr. Farley remarked that DPA offers supervisory training, and Ms. Salkind stated that 50% of the Board's cases have some kind of management issue.

Vicki Caskey, Director of Human Resources at Fort Lewis College, stated that she agrees with Ms. Salkind and Mr. Farley that there is a lack of supervisory training and that it is very expensive to use DPA for such training. At \$600-700 per person plus travel, the cost of training is hard on one's operating budget. Mr. Zakhem stated that the next time the Board travels to Durango, the members hope to provide value through training, not just information. After Ms. Caskey inquire as to options for training, Mr. Zakhem asked what she wanted and stated that DPA and the Board have excellent resources. In addition, online training was discussed, including online supervisory training.

X. EXECUTIVE SESSION

A. Case Status Report

The Board did not go into Executive Session and the meeting ended by consensus.

X. EXECUTIVE SESSION

A. Case Status Report

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APPROVED THIS 19th DAY OF OCTOBER, 2004.

John Zakhem, Chair

Diedra Garcia, Vice-Chair

Troy Eid, Member

Elizabeth Salkind, Member

Linda Siderius, Member